Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-95

FRED DEGREGORIO,

Petitioner,

against

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Opinion Below

Neither the opinion of the Court of Appeals for the Second Circuit nor the opinion of the District Court for the Eastern District of New York has been reported. The opinion of the District Court has been submitted to this Court by petitioner. The Circuit Court opinion is attached hereto.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.*

Question Presented

Did the Court of Appeals for the Second Circuit correctly hold that petitioner was adequately represented by counsel at his state court trial where his attorney, an experienced trial lawyer and one of five retained counsel during the state court proceeding, through numerous pretrial conferences, succeeded in securing an excellent disposition for petitioner in recommending that petitioner plead guilty.

Facts

Beginning on May 17, 1973 a Nassau County Grand Jury filed six indictments against petitioner. By January 29, 1975, petitioner had been charged with twelve Class E Felonies and three Class A Misdemeanors (2a).** Petitioner, represented by retained counsel, Saul Roth, pled guilty at his first arraignment on June 5, 1973 to Possession of Gambling Records, First Degree. On each subsequent arraignment date petitioner entered a plea of guilty. In April of 1974 petitioner retained new counsel, John Sutter. Mr. Roth was relieved as counsel on May 8, 1974 (3a).

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* 28 U.S.C. § 1257 is inapplicable to the case at bar as that section applies to review of judgments of the highest court of a state. 28 U.S.C. § 1254(1) may, however, provide the jurisdictional predicate for the instant petition.

** Numerical references succeeded by "a" refer to Respondent's Appendix in this Court, attached hereto.

During the next three years, following the filing of the original indictments, at least eleven pretrial conferences were held at which extensive plea negotiations took place (3a). On May 25, 1976 petitioner appeared before Hon. Paul S. Lawrence, Acting County Court Judge. The District Attorney informed the Court that petitioner wished to change his plea of not guilty to guilty to Promoting Gambling, First Degree and to Criminal Usury (3a). The District Attorney urged acceptance of the plea because petitioner was facing a mandatory prison term and was pleading to the top count in the indictment. All extant counts (10 felonies and three misdemeanors, 3a) were to be dismissed if the Court accepted the plea. The People further urged acceptance of the plea to save the time and expense of a trial and because the People recognized that "some of the evidence available was questionable" (10a). Petitioner was represented at the time of the entry of his plea of guilty by two retained counsel (7a).

The trial judge ascertained at the plea hearing that petitioner was knowingly and voluntarily waiving certain constitutional rights. The Court further informed petitioner that if upon reading the Probation Report he could not give the petitioner the agreed sentence of one and a half to three years, he would permit withdrawal of the plea (4a).

Petitioner appeared at sentencing on August 9, 1976 with two additional retained counsel, Marvin Zevin and F. Courts Bouse (4a). Mr. Bouse stated that the plea arrangements were "good" from the petitioner's point of view. Nevertheless, he would like an adjournment to review the file in light of petitioner's medical condition (4a-5a). None of his counsel nor petitioner questioned the voluntariness of the plea nor did they suggest that petitioner was innocent (7a). No formal request to withdraw the plea was made. Sentence was imposed consistent with the terms negotiated by petitioner, his counsel and the District Attorney (5a).

Petitioner failed to perfect an appeal from this conviction although a notice of appeal was filed (P. 2a).* Failure to appeal cannot be attributed to the counsel (Mr. Sutter) whose ineffective assistance has been asserted on the instant petition for a writ of habeas corpus as that counsel had been replaced prior to the expiration of the time to perfect an appeal.

After the time to appeal had expired, petitioner commenced an action in state court pursuant to Criminal Procedure Law § 440.10 seeking to vacate the judgment of conviction on the grounds of ineffective assistance of counsel and that the sentencing court had erred in denying a request for an adjournment (1a). Following a review of the facts of the criminal proceeding (1a-4a), the Hon. Henderson W. Morrison, County Court Judge, denied the motion. The Court found that:

> "1. The defendant was not untutored in the proceedings resulting in his incarceration, having been involved in plea bargaining arrangements on at least five previous occasions.
>
> "2. There is no claim that the defendant was relegated to overburdened assigned counsel not of his selection. The defendant has retained four attorneys to date in this matter.
>
> "3. Counsel advising the defendant when the plea was entered was experienced in criminal matters and familiar with the proceedings here.
>
> "4. At the time the defendant entered his plea of guilty, he responded to questions from the bench indicating that he was satisfied with the plea bargain negotiated and with his attorney's efforts on his behalf.

* Citations to the appendix preceded by "P" refer to petitioner's appendix in this Court.

> "5. Trial counsel spent some three years and was involved in at least eleven conferences of record prior to agreeing to this disposition.
>
> "6. The disposition significantly reduced the defendant's exposure to penal sanctions.
>
> "7. The defendant reecived less than the maximum sentence (P. L. 70.06).
>
> "8. Neither the defendant nor any of his attorneys have ever suggested that the defendant was, in fact, innocent.
>
> "9. The People would be seriously prejudiced if forced now to try these indictments after the passage of almost five years since the investigation." (9a-10a)

The Court recognized trial counsel's apparent failure to challenge the legality, under state law, of the People's evidence obtained by electronic surveillance but weighed against that the District Attorney's generous plea offer, induced in part by the People's recognition that some of the evidence was possibly subject to a motion to suppress (10a). Leave to appeal from the denial of petitioner's motion to the Appellate Division, Second Department was denied by Associate Judge J. Irwin Shapiro (P. 2a).

The District Court Opinion

In his application for federal habeas corpus relief petitioner attacked his conviction by order to show cause dated June 6, 1978 on the ground that his Sixth Amendment right to effective assistance of counsel was violated in that trial counsel failed to move to suppress evidence against him derived from electronic surveillance (P. 2a). The application was denied on July 26, 1978 (P. 5a).

In the District Court, petitioner relied on *United States ex rel. Rosner* v. *Commissioner of the New York Department of Correction*, 421 F. Supp. 781 (S.D.N.Y. 1976). The District Court (*Pratt*, D.J.) observed that *Rosner, supra* had been reversed on appeal in *LiPuma* v. *Commissioner, Department of Correction, State of New York*, 560 F. 2d 84 (2d Cir. 1977). The District Court did not, however, rely upon *LiPuma, supra* or *Stone* v. *Powell*, 428 U.S. 465 (1976) upon which *LiPuma, supra* was based. The Court found instead:

> "Although as in *LiPuma*, the 'heart' of this case is a fourth amendment claim that the evidence obtained from surveillance should have been suppressed, it is unnecessary to reach *Stone's* 'full and fair opportunity' analysis here because a guilty plea was entered." (P. 3a)

In finding that petitioner's Sixth Amendment claim failed to meet the standard established by the Second Circuit for allegations of ineffective assistance of counsel, the District Court concluded:

> "Had the suppression hearing been demanded and lost, defendant's plea bargaining power might well have been greatly reduced. Considering the array of serious charges as well as petitioner's past record, his counsel appears to have succeeded in obtaining a fairly light sentence." (P. 4a)

On August 24, 1978 Judge Pratt denied a request for a certificate of probable cause. Petitioner's counsel had requested the certificate to raise the issue of the applicability of *Stone* v. *Powell, supra* to the situation where a Sixth Amendment violation is asserted. In denying the motion, the Court stated:

> "Since the *Stone* v. *Powell* issue was never decided by the court, it may not be raised on appeal."

The Opinion of the Court of Appeals

On June 18, 1979, the Court of Appeals for the Second Circuit affirmed the decision of the District Court in a unanimous decision rendered from the bench following oral argument. The Circuit concluded that petitioner "simply was not denied effective assistance of counsel" (14a). Petitioner was represented by as many as five lawyers none of whom saw fit to make the suppression motion urged, and a suppression motion would not have "succeeded certainly." The Circuit went on to say:

> "The decision not to make a suppression motion, therefore, may have been a tactical one. If the motion were made and lost appellant's bargaining power in the plea negotiations would have been substantially undercut." (15a)

The Court concluded that counsel made a good bargain for petitioner and that petitioner was adequately represented:

> ". . . the proceedings were so far from a farce or mockery of justice that no hearing is required." (15a)

REASON FOR DENYING CERTIORARI

In that the court below correctly held that petitioner's counsel provided adequate representation which would satisfy any of the recognized standards, the question of what standard should be applied in evaluating claims of ineffective assistance of counsel was not implicated in the decision.

Petitioner challenges the "farce or mockery of justice" standard used by the Second Circuit in evaluating the adequacy of representation by counsel. However, in denying the application for a writ of habeas corpus, and in unanimously affirming the opinion of the District Court, the Second Circuit Court of Appeals held that petitioner was adequately represented by all of the recognized standards,

and the question sought to be reviewed herein was surplusage.

Petitioner, a prior felony offender (3a), was facing indictments containing 12 Class E felonies and 3 Class A misdemeanors (2a). Plea negotiations took place over a number of years and included at least eleven pre-trial conferences (3a). Petitioner's counsel, whose adequacy is challenged herein, was able to secure an agreement whereby petitioner pled guilty to 2 felony charges. All other charges were dropped (3a). Petitioner was sentenced to a term of 1½ to 3 years.* Considering the array of charges against him (and the fact that he was sentenced as a second felony offender), petitioner's sentence is light. Not only did petitioner's counsel not render ineffective assistance, but rather, under the circumstances, his representation was more than adequate.

Petitioner with the benefit of counsel made an excellent bargain. As the District Court observed:

> "In such a situation at least, a defendant should not be heard to complain that because the final bargain was made before other possible proceedings were undertaken, he was denied effective assistance of counsel.
> "Had the suppression hearing been demanded and lost, defendant's plea bargaining power might well have been greatly reduced. Considering the array of serious charges as well as petitioner's past record, his counsel appears to have succeeded in obtaining a fairly light sentence." (P. 4a)

Underlying petitioner's argument is the assertion that "a motion to suppress the evidence and to dismiss the indictments would undoubtedly had [sic] succeeded." (Petitioner's petition for certiorari, p. 9). Petitioner's claim, however, is based upon a series of conjectures.

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* Petitioner was released on parole on August 4, 1978.

". . . [D]iscovery *might* have resulted in information which *might* have led to a successful motion to suppress the introduction of illegally obtained evidence which *might* have resulted in the dismissal of the indictments against the defendant." (6a) (Emphasis in original). The District Court, however, merely stated that "Petitioner's motion to suppress might well have succeeded." (P. 2a). Even if the tapes were suppressed, it does not follow that the indictment would have been dismissed. There was, at least, an unnamed informer who provided the information which secured the order permitting the electronic surveillance (P. 1a). The Second Circuit observed that even if a suppression motion had succeeded, rendering the tapes inadmissible as evidence in chief, they could still be used to establish probable cause for a search warrant (15a). It must be noted that in *all* the cases cited by petitioner for the proposition that the tapes would have been suppressed the People were permitted to offer a "satisfactory explanation" for the delay in sealing. The state had no such opportunity in the case at bar because petitioner chose to forego direct appeal as well as a suppression motion.* In addition, a delay approximating the two week delay in the instant case has been excused due to a satisfactory explanation. *United States* v. *Skiaroff*, 506 F. 2d 837, 840 (5th Cir. 1975) (14 day delay); *United States* v. *Poeta*, 455 F. 2d 117, 122 (2d Cir. 1972), *cert. denied* 406 U.S. 948 (1973) (13 day delay).

Petitioner's trial counsel's representation indicates a strategic choice to obtain the best possible results. The court below stated:

> "If the motion were made and lost, appellant's bargaining power in the plea negotiations would have been substantially undercut." (15a)

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* This tactic must be attributed to at least three separately retained counsel.

Counsel's strategy appears to have been effective as petitioner received a light sentence (15a). An appellate court ought not question the particular strategy employed by counsel, particularly where that strategy is effective. See *United States ex rel. Walker* v. *Henderson,* 492 F. 2d 1311 (2d Cir.), *cert. denied* 417 U.S. 972 (1974); *United States* v. *Yanishefsky,* 500 F. 2d 1327 (2d Cir. 1974); *United States* v. *Matalon,* 445 F. 2d 1215 (2d Cir.), *cert. denied* 404 U.S. 853 (1971).

Petitioner voluntarily pled guilty upon advice of counsel. Rather than being the victim of ineffective assistance of counsel, petitioner received commendable assistance. As stated by the Supreme Court in *Tollett* v. *Henderson,* 411 U.S. 258, 268 (1973):

> "Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law . . . A prospect of plea bargaining, the expectation or hope of a lesser sentence, of the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement . . . might be factually supported."

It should be noted that petitioner was represented, in succession by Saul Roth (3a), John Sutter (3a), Gino Pappa, Marvin Zevin (4a) and F. Courts Bouse (4a), all retained counsel. Apparently, petitioner is asserting that Mr. Sutter alone rendered ineffective assistance of counsel (petitioner's petition for certiorari, p. 8). In order to grant the writ it would be necessary to find all counsel ineffective as no motions were made by counsel who preceded Mr. Sutter and no direct appeal was taken by counsel subsequent to Mr. Sutter. Apparently, all counsel concurred in the strategy adopted, a strategy which was eminently successful.

Not only were the proceedings in this case not a "farce or a mockery of justice", but rather counsel provided excellent representation which resulted in the petitioner's receiving a light sentence. In that the standard applied to cases asserting ineffective assistance of counsel by the Second Circuit was not implicated in the decision, as counsel's assistance was more than adequate to meet any standard, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 7, 1979

Respectfully submitted,

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APPENDIX A

Opinion of the County Court—Nassau County.

COUNTY COURT—NASSAU COUNTY
Present: HON. HENDERSON W. MORRISON, County Judge.

Motion Cal. #C-1140

Indictment #37384, 37751, 38260, 41290, 41415 & 41658

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PEOPLE OF THE STATE OF NEW YORK

—against—

FRED DE GREGORIO,

Defendant

By this motion, the defendant seeks an order of this Court vacating a previously entered judgment of conviction, pursuant to Criminal Procedure Law § 440.10. The defendant's counsel advances two related arguments in support of this motion. First, the defendant alleges that he was denied the effective assistance of counsel during the proceedings which resulted in his conviction. Second,

he argues that the trial court erred in denying his request, advanced at time of sentence, to adjourn the proceedings so that newly retained counsel could familiarize himself with the defendant's case and determine the advisability of withdrawing the guilty plea entered by the defendant.

The People strenuously oppose the defendant's motion.

The defendant attracted the attention of Nassau County law enforcement officials sometime in 1973. The defendant, who already had some familiarity with the practices of the criminal courts and correctional facilities of this State, was the subject of electronic surveillance authorized by an order of this Court. As a result of evidence obtained from that surveillance and a subsequent search warrant, a Nassau County Grand Jury filed six indictments charging the defendant with the following crimes.

Indictment	*Date*	*Charge*
37384	5/17/73	Possession of Gambling Records First Degree P.L. § 225.20, Class E Felony
37751	6/28/73	(4 counts) Criminal Usury, P.L. § 190.40, Class E Felony Possession of Usurious Loan Records, P.L. 190.45, A Misdemeanor
38260	9/12/73	Possession of Gambling Records First Degree P.L. § 255.20, Class E Felony Promoting Gambling Second Degree, P.L. § 225.20, A Misdemeanor Conspiracy in the Third Degree, P.L. § 105.05, A Misdemeanor
41290	12/16/74	Criminal Usury, P.L. § 190.40, Class E Felony
41415	1/ 2/75	(4 counts) Criminal Usury, P.L. § 190.40, Class E Felony
41658	1/29/75	Criminal Usury, P.L. § 190.40, Class E Felony

The defendant had thus been charged, by January 29, 1975, with twelve Class E felonies and 3 Class A Misdemeanors.

The defendant's first arraignment, on Indictment #37384, took place on June 5, 1973. The defendant, represented by Saul Roth, Esq. entered a plea of not guilty. On each subsequent arraignment date, the defendant entered an identical plea. The defendant, in April of 1974, retained new counsel, enlisting John Joseph Sutter, Esq. and Saul Roth, Esq. was relieved on May 8 of that year.

As a result of the additional charges lodged against the defendant, and because of numerous adjournments necessitated by the defendant's health, resolution of these matters took some three years. The records of this Court reflect that at least eleven pretrail conferences were held during that period. The records do not indicate that the defendant or his attorneys made any pretrial applications.

On May 25, 1976, the defendant appeared before the Hon. Paul S. Lawrence, then serving as an Acting County Court Judge. The People indicated to the Court that the defendant wished to enter a plea of guilty to the charge of Promoting Gambling in the First Degree contained in Indictment #38260 and to one count of Criminal Usury contained in Indictment #41415. The District Attorney felt that the length of the anticipated trial together with the uncertainty of success merited such a bargain. In return for his plea of guilty to two E Felonies, the People agreed to forego prosecution of the remaining ten Felonies and three Misdemeanors as well as a pending District Court matter. Against these considerations, the defendant had to weigh the prospect of being sentenced as a Prior Felony Offender.

The Court advised the defendant of his rights during the proceeding, of the nature of the plea arrangement proposed and of its consequences, with particular atten-

tion to the rights the defendant would be surrendering. The judge further indicated that if he could not sentence the defendant to two concurrent sentences of 1½ to 3 years, the defendant would be afforded an opportunity to withdraw his plea.

Throughout the questioning conducted, the defendant's answers and the statements of his counsel were consistent with the trial judge's conclusion.

"The Court: At this time I am satisfied that the defendant understands the nature of the charges and the nature of the plea and possible consequences of his plea, that he is subjecting himself to possible imprisonment and the defendant has discussed his legal rights with his attorney and understands that he is waiving certain constitutional rights. The defendant has been made no threats or promises, other than those I stated on the record here and his plea is voluntary and of his own free will.

Now, sentencing for many reasons will be put over until July 26th, 1976."

The defendant did not appear on July 26, 1976, although his counsel was present. A bench warrant was issued with execution stayed until August 9, 1976.

On August 9, 1976 the defendant appeared for sentence. Apparently, during the intervening period he had consulted new counsel, for on that date he was accompanied by Marvin Zevin, Esq. of Sutter, Moffatt, Yannelli & Zevin and F. Courts Bouse, Esq.

In response to the Court's inquiry, Mr. Bouse stated that the defendant had consulted with him concerning the advisability of withdrawing his previously entered guilty plea. He further stated that although he was sure the plea arrangements were "good" as far as the defendant was concerned, the defendant's medical condition was such

that incarceration might result in his untimely demise. Based upon the foregoing, new counsel requested an adjournment for the purpose of further reviewing the file. At no time did Mr. Bouse or the defendant question the voluntariness of the defendant's plea or suggest that the defendant was innocent. In fact, no formal request to withdraw the plea was made.

The Court denied the request for an adjournment.

Returning to Mr. Zevin, the Court inquired whether he had anything to say prior to the imposition of sentence. Mr. Zevin informed the Court that he was totally unfamiliar with the facts of the case and, for that reason, declined to comment.

The Court then asked the defendant whether he wshed to be heard. The defendant requested only that he be sentenced to an institution where hospital facilities would be available.

The Court assured the defendant that if he needed medical care it would be made available to him. The Court again asked Mr. Zevin if he wished to be heard on sentence and Mr. Zevin once again declined.

The Court then imposed sentence in accordance with the terms of the plea bargain previously negotiated by the People, the defendant's trial counsel and the defendant.

As noted earlier, the defendant's instant application raises two related issues.

First, the defendant contends that he was denied the effective assistance of counsel guaranteed him by the Constitution of this State and the Fourteenth Amendment of the Constitution of the United States. (N.Y. Const., Art. I, § 6). The defendant argues that the following omissions compel such a conclusion:

1. Trial counsel for the defendant failed to make any pretrial motions contesting the validity of the eaves-

dropping warrants or the conduct of the electronic surveillance conducted pursuant to those warrants, with particular emphasis on the "sealing" requirements of Article 700 of the CPL. (*People* v. *Nicoletti,* 34 N.Y. 2d 249).

2. Trial counsel similarly failed to question the legality of the use of evidence seized pursuant to the search warrant utilized in this investigation.

The defendant's present counsel argues that discovery *might* have resulted in information which *might* have led to a successful motion to suppress the introduction of illegally obtained evidence which *might* have resulted in the dismissal of the indictments against the defendant. Counsel argues that the defendant's trial attorneys clearly erred in permitting the defendant to enter a plea of guilty to a felony without making applications to the Court for discovery and suppression of evidence.

Counsel on this motion also contends that the trial court erred in failing to grant the defendant's motion to adjourn the proceedings at time of sentence to permit newly retained counsel to move to vacate the guilty plea entered by the defendant. Although the defendant's third argument addresses itself only to the wisdom of the Court's decision not to grant an adjournment, it must also be considered an aspect of his right to counsel argument, in view of the unfamiliarity of both of his attorneys with the conduct of his case at the time of sentence.

First, it must be understood that any defects or flaws in the authorization or conduct of the electronic surveillance, or any illegality tainting the evidence seized pursuant to the search warrant is irrelevant to this discussion except as it relates to the defendant's argument that he was denied the effective assistance of counsel. Where a defendant pleads guilty, he waives certain rights and evinces, prima facie, an intention to forego appellate review of his con-

viction. (*People* v. *Melton,* 35 N Y 2d 327). Inasmuch as this defendant elected to enter a plea of guilty, he is not now entitled to an order vacating the judgment of conviction solely on the ground that the validity of the search warrant or the conduct of the electronic surveillance might have been questioned at trial. (*People* v. *Brown,* 20 A D 2d 570; *People* v. *Upson,* 20 A D 2d 572).

Similarly, the trial court's decision to deny the defendant's motion to adjourn the sentencing proceedings does not, without more, entitle the defendant to the relief sought. In some instances, a hearing may be required to determine whether such an application is made in good faith and should be granted. (Cf. *People* v. *Pittman,* 50 A D 2d 721; *People* v. *McKennion,* 27 N Y 2d 671). However, the decision to hold such a hearing rests in the discretion of the trial court. (*People* v. *Friedman,* 39 N Y 2d 463; *People* v. *Miller,* 42 N Y 2d 946). The trial judge was fully familiar with the facts and circumstances of this case and presided when the defendant entered his plea. The defendant voluntarily admitted his guilt knowing the consequences of such a plea while assisted by experienced counsel familiar with the facts of the case. Finally, no question was raised by the defendant or either of the attorneys accompanying him at the time of sentence as to the innocence of the defendant. In fact, the only reason advanced for the defendant's change of heart was his dissatisfaction with the sentence he bargained for. Under all the circumstances, it cannot be said that the trial court abused its discretion. Even if the facts compelled such a conclusion, the defendant would not be entitled to relief pursuant to CPL 440.10 because such a claim should have been raised on appeal. (CPL 440.10(2)(c)). (*People* v. *Rodriguez,* 37 A D 2d 962; *People* v. *Landin,* 31 A D 2d 944).

The question remains whether the entire record taken together with the allegations of the defendant, evidences a

denial of the defendant's right to the effective assistance of counsel, and, if so, whether, the defendant is entitled to the relief sought.

A defendant may properly allege that he was denied the effective assistance of counsel in support of a motion to vacate judgment. (*People* v. *Silverman,* 3 N Y 2d 200; *People* v. *Harrigan,* 7 N Y 2d 317). This imposes upon upon the reviewing court a difficult task for several reasons.

First, what amounts to "effective assistance of counsel" is hardly susceptible of definition and varies from case to case. As the Court of Appeals noted in *People* v. *Bennett:*

> "It is impossible to define with any precision what constitutes 'inadequate' or 'ineffective' legal representation or to formulate standards which will apply in all cases." (*People* v. *Bennett,* 29 N Y 2d 462, at 466).

The Court of Appeals has vacated convictions where there has been "a complete lack of investigation or preparation whatever on the only defenses available." (*People* v. *Bennett, supra,* at 467) or the conduct of the defense rendered "the trial" a farce and a mockery of justice." (*People* v. *Brown,* 9 N Y 2d 359; *People* v. *Tomaselli,* 7 N Y 2d 350).

Still, the Court has recognized that "it would be folly for the Courts to sit and hear disappointed prisoners try their lawyers on charges of incompetent representation" (*People* v. *Brown,* supra). Neither should the reviewing Court sit in judgment on every action of trial counsel, even where some are plainly incorrect. Errorless counsel is not required. (*People* v. *LaBree,* 34 N Y 2d 257).

Against this standard must be measured the scanty record available upon a conviction based upon a plea of guilty. The reviewing court is not privy to the hours of negotiation between the People and defense counsel. Nor is it a party to the conferences between defense counsel and the de-

fendant. Further, the Court cannot know how the defendant weighs the uncertainties of trial against the bargain offered by the People. (Cf. *People* v. *Francis,* 38 N Y 2d 150, at 155).

Two final considerations merit the reviewing Court's attention: First, post-conviction distaste with the realities of incarceration is not a rare occurrence. Often, that distaste will extend to the defendant's counsel, whose role in defendant's incarceration may not be viewed by the defendant with impartiality. To vitiate every conviction based upon the entry of a guilty plea because of the defendant's post-conviction dissatisfaction with the performance of his counsel, justified or not, would destroy the delicate integrity of the plea bargaining process. (*P.* v. *Romera,* NYLJ, 2/14/78, p. 16, —— A D 2d ——, (App. Div.2nd Dept.)).

Finally, the reviewing Court must be alert to the fact that granting a motion to vacate judgment long after the defendant's conviction may seriously prejudice the People.

Based upon the foregoing, this Court cannot conclude that the defendant is entitled to the relief sought. Several factors compel this conclusion.

1. The defendant was not untutored in the proceedings resulting in his incarceration, having been involved in plea bargaining arrangements on at least five previous occasions.

2. There is no claim that the defendant was relegated to overburdened assigned counsel not of his selection. The defendant has retained four attorneys to date in this matter.

3. Counsel advising the defendant when the plea was entered was experienced in criminal matters and familiar with the proceedings here.

4. At the time the defendant entered his plea of guilty, he responded to questions from the bench indicating that he was satisfied with the plea bargain negotiated, and with his attorney's efforts on his behalf.

5. Trial counsel spent some three years and was involved in at least eleven conferences of record prior to agreeing to this disposition.

6. The disposition significantly reduced the defendant's exposure to penal sanctions.

7. The defendant received less than the maximum sentence. (P.L. 70.06).

8. Neither the defendant nor any of his attorneys have ever suggested that the defendant was, in fact, innocent.

9. The People would be seriously prejudiced if forced now to try these indictments after the passage of almost five years, since the investigation.

Against those factors, this Court has weighed the two points raised by counsel. First is trial counsel's failure to contest the legality of the People's evidence. The mere fact that trial counsel made no pre-trial motions does not, without more, indicate that the defendant received inadequate assistance of counsel. (*People* v. *Donald R. E.*, 53 AD 2d 780). There is no reason to assume that counsel was unaware of the potential infirmities of the People's evidence, either as a result of his own investigation, or as a result of pre-trial conferences with the prosecution. Indeed before the defendant entered his plea, the District Attorney indicated that the reason for the generous plea offer was the People's recognition that some of the evidence available was questionable. The most that can be said, and

that without assurance, is that defense counsel may have erred in not pressing more vigorously, on the record, for pre-trial disclosure. It cannot be said that any omission on the part of counsel was so glaring as to amount to a denial of the defendant's right to due process.

Similarly, this Court has concluded the defendant's abortive attempt to adjourn the proceedings at time of sentence did not occasion a denial of the effective assistance of counsel. Although it may be argued that the defendant was contemplating a change of counsel, he made no such application to the trial Court. All that the defendant's new counsel sought was an adjournment, to familiarize himself with the case, at a time when the proceedings were for all intents and purposes concluded. All that remained was for the Court to pronounce sentence in accordance with the bargain the defendant had made. Further, new counsel, offered no justification for permitting the defendant to withdraw his plea. Nor could defendant's trial counsel, also present, enlighten the Court.

It can be inferred from the record that the attorney repesenting the defendant's trial counsel, as well as the defendant's new counsel, were somewhat unfamiliar with this matter. But, as noted earlier the trial court's refusal to grant the adjournment to permit new counsel to study the case is not, standing alone, a ground for relief under CPL 440.10. Since the sole purpose of the proceeding was to sentence the defendant in accordance with the terms of the plea bargain, and the trial court fully complied with the terms of the bargain in the presence of two attorneys for the defendant, this Court cannot conclude that the proceedings at time of sentence constituted a denial of the defendant's right to the effective assistance of counsel sufficient to justify an order vacating the defendant's conviction.

Appendix A—Opinion of the County Court—Nassau County.

The comments of the Court of Appeals in *People* v. *Francis,* supra, are appropriate here as well.

> "A plea is a bargain struck by a defendant and a prosecutor who may both be in doubt about the outcome of a trial. (People v. Nixon, 21 N Y 2d 338, supra; People v. Foster, 19 N Y 2d 150; People v. Serrano, 15 N Y 2d 304) . . . In arriving at his bargaining position, a defendant may well calculate not only uncertainties in how a court may view the facts in his case but how it may view the applicability of law as well. On such matters, Judges themselves may often be expected to differ with one another, a factor to which the parties to plea bargaining need not be taken to be oblivious. Where the court which accepts the plea has no reason to believe that the plea is unfair or inappropriate, the bargain becomes final. Unless there was unfairness in its negotiation or acceptance, the fact that a loophole might have been available to defendant is not sufficient grounds upon which to set aside the bargain made. The defendant here has not been shown to have been victimized by inherent unfairness, nor is it evident that the court should have perceived any."
> (*Peopde* v. *Francis,* 38 N Y 2d 150, at 155).

Accordingly, the defendant's application is denied in all respects.

ENTER

HENDERSON W. MORRISON,
JCC

Granted
Dated February 21, 1978
HAROLD W. MCCONNEL
Clerk

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit.

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 79-2062

FRED DE GREGORIO,

Petitioner-Appellant,

v.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent-Appellee.

Before:

HON. STERRY R. WATERMAN, WILFRED FEINBERG, and WILLIAM H. TIMBERS, *Circuit Judges.*

New York, June 18, 1979

Statement made by the court at disposition of appeal in open court.

JUDGE FEINBERG:

You understand that when we dispose of a case in open

court we do so under our local rule because we think the issues are clear and can only be decided one way and it is no reflection on the quality of the advocacy. This is an appeal from an order of the United States District Court for the Eastern District of New York, by Judge Pratt, who was the Judge, which denied appellant's application for a writ of habeas corpus. Appellant had pleaded guilty in the State court to two felony counts charging promoting gambling and usury in violation of New York State law in full satisfaction of six different indictments charging a total of 12 felonies and three misdemeanors. He received a one and a half to three years sentence. He was released from state custody on parole in August, 1978.

Appellant claimed before us on this appeal that he was denied effective assistance of counsel because his lawyer failed to bring a suppression motion to challenge evidence seized pursuant to a search warrant—the probable cause for which was taped conversations made under a state wiretap order. Apparently there was a delay in sealing the tapes which appellant asserts barred use of the tapes for any purpose under the state law, any purpose, thereby vitiating the probable cause for the search warrant. Appellant claims that without the evidence seized pursuant to the search warrant the indictments would have had to be dismissed for insufficient evidence.

We conclude that there was no error by the District Judge in denying appellant's application for a writ of habeas corpus without holding a hearing. Appellant simply was not denied effective assistance of counsel. First, appellant apparently claims only one of his lawyers was ineffective, yet appellant was represented by several lawyers, as many as five at different times, none of whom made the suppression motion that appellant argues should

have been made. Second, while it is true as Judge Pratt pointed out in his opinion that a motion to suppress might have succeeded, it is far from obvious that it would have succeeded certainly. The State may have been able to justify the delay in sealing the tapes, and even if the tapes were rendered inadmissible as evidence in chief by reason of the delay it may be that under state law they could still be used to establish probable cause for the search warrant. Compare, for example, a case in this Court, *United States* v. *Fury,* 554 F.2d 522 at page 532. The decision not to make a suppression motion, therefore, may have been a tactical one. If the motion were made and lost appellant's bargaining power in the plea negotiations would have been substantially undercut. As it was appellant's counsel made what appears to be a very good plea bargain for appellant. Many major charges were dropped. Considering appellant's status as a second felony offender, the sentence he received was light. We think it is clear that on the issue before us appellant was adequately represented and that the proceedings were so far from a farce or mockery of justice that no hearing is required.

We therefore affirm the judgment of the District Court. Thank you, Gentlemen.